September 12, 1995

Honorable Kenneth Mortimer
President
University of Hawaii
2444 Dole Street
Honolulu, Hawaii 96822

Attention: Dr. Peter Rubin
Chairperson, University Committee on Ethics in Research and Scholarly Activities

Dear President Mortimer:

Re: Disclosure of a Written Report Received By the University Ethics Committee to Faculty Member to Whom it Pertains

This is in reply to a letter from Dr. Peter Rubin requesting the Office of Information Practices ("OIP") to provide him with an advisory opinion concerning the above-referenced matter.

In particular, Dr. Rubin requested an opinion concerning a written statement filed with the University's Committee on Ethics in Research and Scholarly Activities ("Ethics Committee") which alleges misconduct by another faculty member in research or scholarly activities (the "statement"). The faculty member, who was alleged to have engaged in scientific misconduct, requested the Ethics Committee to provide him with a copy of the statement after its existence became known to the faculty member.

ISSUE PRESENTED

Whether, under part III of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Ethics Committee must disclose to the faculty member to whom it pertains, the statement alleging that the faculty member engaged in scientific misconduct, when: (1) the Ethics Committee

has determined that the statement did not merit formal investigation under Executive Policy No. E5.211 (April 1992), (2) the University's Policy on scientific misconduct provides that the statement initiating the procedures shall remain confidential in the initial stages, and (3) the individual filing the statement with the Ethics Committee marked the statement "confidential information."

BRIEF ANSWER

It is our opinion that the written statement may be withheld from the faculty member to whom it pertains under section 92F-22(2) (Supp. 1992) and (Comp. 1993).

Except as provided in section 92F-22, Hawaii Revised Statutes, each agency must permit an individual to inspect and copy the individual's "personal records." Under the UIPA, the term "personal record," includes "any item, collection, or grouping of information about an individual that is maintained by an agency." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Having examined the fifty page statement submitted to the Ethics Committee alleging misconduct by a faculty member, it is our opinion that the statement is a "personal record" of the faculty member accused of the misconduct.

Under section 92F-22(2), Hawaii Revised Statutes, an agency is not required to grant an individual access to personal records, "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality."

While we believe that an agency should not give blanket assurances of confidentiality, and that an assurance of confidentiality must be supported by good cause, we believe that the University's Policy does contain an assurance of confidentiality to those reporting misconduct, at least during the initial stages of the Ethics Committee's inquiry, and that such policy is well-founded.

The exemption in section 92F-22(2), Hawaii Revised Statutes, applies only to information that would identify a source who provided information to the agency and generally does not apply to the information furnished by the source. However, a federal court decision involving a similar exemption in the Federal Privacy Act, 5 U.S.C. § 552a (1988), indicates that where the identity of the source is already known to the requester, the agency may withhold both the identity and information furnished

by the agency source, because the exemption protects any substantive information that would reveal that the individual was the agency's source for the information.

Therefore, we conclude that since the identity of the author of the written statement was made known to the faculty member accused of misconduct through other means, that the Ethics Committee may withhold access to the entire fifty page statement under section 92F-22(2), Hawaii Revised Statutes.

FACTS

The University has an executive policy designed to: (1) maintain and assess the ethical conduct of research and scholarly activities within the University and (2) comply with federal requirements for the adoption of such a policy. This policy, Executive Policy No. E5.211, entitled "Ethical Standards in Research and Scholarly Activities" (the "policy") sets forth administrative procedures for the reporting and processing of instances of possible misconduct or fraud in research or scholarly activities,[1] and for the investigation and disposition of allegations or instances of apparent misconduct.

Reports of possible misconduct are processed by the Ethics Committee in several stages. In the case of a report of misconduct made directly to the Ethics Committee, a report is processed in the following stages: (1) Informal Inquiry, (2) Formal Investigation, and (3) Hearing and Disposition. Each of these phases is explained below:

A. Informal Inquiry

During this stage the Ethics Committee reviews the report of misconduct to screen out charges that are groundless or capricious. A member of the Ethics Committee submits a written account of the matter to a Review Panel which consists of the member who received the statement and at least four other members of the Ethics Committee. During this phase, if the Review Panel determines that there is a reasonable basis to believe that a formal investigation is warranted, the matter proceeds to stage two.

[1]The types of misconduct in research or scholarship that are subject to the policy include: (1) falsification of data, (2) plagiarism, (3) abuse of confidentiality, (4) dishonesty in publication, (5) deliberate violation of regulations, (6) property violations, and (7) failure to report observed fraud.

The University's Policy provides:

> The accused has the most to lose in the case of unfounded charges. Thus, while the first stage remains confidential, the right of notice applies at the second stage, and a right of a public hearing applies at the third stage. It is particularly important in cases of politically-motivated and other improper charges that the accused have the right of public confrontation and cross examination of witnesses. While negative publicity may harm the university, there is a greater potential harm that false charges and the sanctions that flow from them will escape proper scrutiny. Thus the accused may--but need not--demand an open hearing.
>
> In addition to protection for the accused, the procedures take into account the plight of those who suspect misconduct. Given the power relationships in any university and the well-understood history of retaliation against whistleblowers, these procedures work to encourage reporting of misconduct by limiting the burdens and risks on those who bring forward information. The committee itself--not the informant--bears the burden of going forward with the investigation and charge. To the greatest extent possible, the statement initiating the procedures remains confidential in the initial stages.

University Policy, Preamble at p. 2 (emphasis added).

B. Formal Investigation Stage

During this stage, the accused individual must be notified in writing at once, according to the procedures set forth in article XV, section B.2 of the collective bargaining agreement between the University and the University of Hawaii Professional Assembly. The accused individual may file an answer to the charge with the Vice President for Research and Graduate Education. If the accused person fails to file an answer within 15 calendar days, the employer may proceed with disciplinary action, which shall be final and binding upon any person who is not a member of a collective bargaining unit, or who is a member

of bargaining unit 7.

C. Hearing and Disposition Stage

If the accused files a rebuttal to the charges, then the Vice President must refer the matter to the Ethics Committee for formal investigation, hearing, and disposition in accordance with the procedures set forth in the "Standards and Procedures" which are an attachment to the University's policy.

By letter dated July 15, 1993, a faculty member at the University of Hawaii submitted a fifty page statement to a member of the Ethics Committee, alleging that another faculty member (the "respondent") engaged in misconduct. The written statement was marked "CONFIDENTIAL" in large upper case letters at the top of the first page by the faculty member who submitted it, and each subsequent page bears the heading in upper case lettering, "Confidential Information About Scientific Misconduct Presented by [author's name]."

The OIP's investigation of the facts of this case indicates that the respondent of the Ethics Committee's investigation became informed of the identity of the individual filing the statement against the respondent, through what may be described as a leak, and through other sources.[2]

The respondent made a request to the Ethics Committee to inspect the fifty page statement that was filed with the Ethics Committee. After investigating the written statement of misconduct, the Ethics Committee determined that an insufficient basis existed to proceed to stage two, formal investigation. The chairperson of the Ethics Committee then contacted the OIP by telephone for advice in responding to the respondent's request. After a series of telephone conversations, and due to the nature of the issue presented, the OIP advised you to request a formal advisory opinion.

At the request of the OIP, the Ethics Committee furnished it with

[2]According to a letter to the OIP from the respondent, the person filing the statement also filed charges with the State Ethics Commission and the Ethics Commission provided the complaint to the respondent for a reply. Also, according to the respondent, the identity of the source was confirmed by one of the Ethics Committee members, and by a federal agency, USAID, when that agency requested the respondent to respond to charges filed with the agency.

a copy of the fifty page statement which alleges that the respondent engaged in unethical misconduct.

DISCUSSION

I. INTRODUCTION: ACCESS TO PERSONAL RECORDS

The question presented by the University must be resolved with reference to part III of the UIPA[3], entitled "Disclosure of Personal Records," sections 92F-21 through 92F-28, Hawaii Revised Statutes, which govern an individual's right to inspect and copy the individual's accessible "personal records." The principal purposes of part III of the UIPA are to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating them," and to "[p]rovide for accurate, relevant, timely, and complete government records." Haw. Rev. Stat. § 92F-2 (Supp. 1992).

The commentary to the Uniform Information Practices Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled, reflects that Article III of the Model Code "establishes a statutory framework similar to the Federal Privacy Act." Model Code § 3-101 commentary at 21 (1980). Congress assigned great importance to the right of the individual to review the

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[3]The UIPA's legislative history reflects that:

> The bill will recodify major portions of Chapter 92E, HRS, in Sections -21 to -28 except that these provisions will be limited to handling an individual's desire to see his or her own record. All other requests for access to personal records (i.e. by others) will be handled by the preceding sections of the bill. In this way, the very important right to review and correct one's own record is not confused with general access questions.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 691 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphasis added).

individual's personal records. The legislative history of the Federal Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act") provides:

> The Committee believes that the size of the Federal Government, the sheer number of personal records it must handle, and the growing complexities of information technology require that the full protections against abuses of the power of the government to affect the privacy of the individual and the confidentiality of personal information must depend in part upon the participation of the individual in monitoring the maintenance and disclosure of his own file.
>
> To this end, we agree with members of the numerous respected study bodies that an individual should have the right to discover if he is the subject of a government file, to be granted access to it, to be able to assure the accuracy of it, and to determine whether the file has been abused by improper disclosure.
>
> The Committee agrees with the conclusion of one government study that "In the majority of cases, the citizen's right of access to information kept on him by the Federal Government will not interfere with the ongoing program of the agency. In addition, giving the individual a right of access will often be a desirable adjunct to any other system designed to insure file accuracy."
>
> Furthermore, your Committee adopts the timely observation by one scholar from the Council on Science of Technology study that "giving the individual maximum ability to examine what the Government knows on the person should help promote citizen confidence in activities of the Federal Government and is essential to assure that notions of due process are employed when decisions are made on the basis of personal information."

S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974) (emphasis

added).

The Committee of Rights, Suffrage and Elections of the Constitutional Convention of 1978 noted, in discussing a proposed privacy amendment to the Constitution of the State of Hawaii, that "the right to privacy should ensure that at the least an individual shall have the right to inspect records to correct information about himself." Standing Committee Report No. 69, Vol. I Proceedings of the 1978 Constitutional Convention of the State of Hawaii at 674 (emphasis added).

Under the UIPA, the term "personal record," means:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voice print or a photograph.

Haw. Rev. Stat. §92F-3 (Supp. 1992) (emphases added).

As noted above, the commentary to the Model Code reflects that Article III of the Model Code establishes a statutory framework similar to the Privacy Act. The definition of the term "personal record" is nearly identical to the definition of the term "record" set forth in the Federal Privacy Act of 1974, 5 U.S.C. §552a(a)(4) ("Privacy Act").[4] Federal courts examining

[4]Under section 552a(a)(4) of the Privacy Act, the term "record" means:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

this definition have found that to be a "record" under the Privacy Act the information must identify an individual.

Consistent with Guidelines adopted by the U.S. Office of Management and Budget ("OMB") implementing the Privacy Act[5], the Court of Appeals for the Third Circuit has adopted a broad interpretation and held that the term "record" "encompasses any information about an individual that is linked to that individual through an identifying particular" and is not "limited to information which taken alone directly reflects a characteristic or quality." Quinn v. Stone, 978 F.2d 126, 133 (3rd Cir. 1992) (out-of-date home addresses on roster and time card information held to be records covered by the Privacy Act).

Courts in other circuits have adopted a more narrow construction of the term such that a "record" "must reflect some quality or characteristic of the individual involved." Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983); see also Topurdize v. U.S. Information Agency, 772 F. Supp. 662, 664 (D.D.C. 1991); Unt v. Aerospace Corp., 765 F.2d 1440, 1448-49 (9th Cir. 1985).

Furthermore, federal courts have determined that under the Privacy Act, a "record" is about an individual, even if the record contains information about third persons. In Voelker v. IRS, 646 F.2d 332, 333 (8th Cir. 1981), the court held that "[t]here is no justification for requiring that information in a requesting individual's record meet some separate 'pertaining to' standard before disclosure is authorized . . . [and] [i]n any

[5]Guidelines issued by the U.S. Office of Management and Budget do not limit the term "record" to information that is "personal" or specifically about an individual's characteristics or qualities:

> [Record] includes individual identifiers in any form including, but not limited to, fingerprints, voice-prints and photographs . . . .
>
> The term "record" was defined "to assure the intent that a record can include as little as one descriptive item about an individual. (Congressional Record, p. S21818, December 17, 1974 and p.H12246, December 17, 1974).

OMB Guidelines, 40 Fed. Reg. 28,948, 28,951-52 (1975).

event, it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual." See also Topurdize v. USIA, 772 F. Supp. 662 (D.D.C. 1991). Also, in a recent Privacy Act case, the U.S. District Court for the District of Columbia ruled that the definition of "record" in the Privacy Act does not require that every page of the records at issue must contain the individual's name, finding that "record" exists so long as "any item, collection, or grouping of information contains the individual's name." Wanda Henke v. Dep't of Commerce, slip op., Civil No. 94-189 (D.D.C. May 26, 1995)

Based upon our examination of the fifty page statement of unethical misconduct, the OIP finds as a matter of law that the statement constitutes a "personal record" of the respondent faculty member. The statement contains numerous references to the faculty member and the faculty member's actions, conduct, activities, and character. In our view, it contains information "about" the respondent.

II. EXEMPTIONS TO AN INDIVIDUAL'S RIGHT OF ACCESS TO PERSONAL RECORDS

With regard the disclosure of personal records to the individuals to whom they pertain, section 92F-23, Hawaii Revised Statutes, describes an agency's affirmative disclosure duties, as follows:

> **§92F-23 Access to personal record; initial procedure.** Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92F-22. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay.

Haw. Rev. Stat. § 92F-23 (Supp. 1992) (emphasis added)[6].

[6]Under part III of the UIPA, like under the Privacy Act,

Accordingly, unless an individual's personal record is exempt from the individual's inspection under one of the exemptions set forth by section 92F-22, Hawaii Revised Statutes, an agency must permit the individual to whom the record pertains to inspect and copy the same within ten working days of the date of the individual's request.

Based upon our examination of the written statement, only one of the exemptions in section 92F-22, Hawaii Revised Statutes, would permit the University to withhold the statement from the faculty member to whom it pertains:

> **§92F-22 Exemptions and limitations on individual access.** An agency is not required by this part to grant an individual access to personal records, or information in such records:
>
> . . . .
>
> (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality . . . . ;

Haw. Rev. Stat § 92F-22(2) (Supp. 1992) and (Comp. 1993).

A. Express Promise of Confidentiality

In OIP Opinion Letter No. 92-24 (Dec. 2, 1992), the OIP observed that the Privacy Act contains an exemption similar to that set forth in section 92F-22(2), Hawaii Revised Statutes. See 5 U.S.C. § 552a(k)(5). OMB Guidelines indicate that federal agencies are not to give blanket assurances of confidentiality. Rather, the exemption for confidential sources must be invoked selectively:

(..continued)
"when the individual to whom the information pertains is also the individual requesting the information, the Privacy Act presumes that disclosure to the individual will occur." Topurdize v. U.S. Information Agency, 772 F. Supp. 662, (D.D.C. 1991), quoting Wren v. Harris, 675 F.2d 1144, 1146 (10th Cir. 1982).

> [A] record may only be withheld to protect the identity of a source if
>
> An express guarantee was made to the source that his or her identity would not be revealed (Such guarantees should be made on a selective basis, i.e., individuals from whom information is solicited for law enforcement purposes should be advised that their identity may be disclosed to the individual to whom the record pertains unless a source expressly requests that his or her identity not be revealed as a condition of furnishing information);

OMB Guidelines, 40 Fed. Reg. 28,948, 28,974; see also, Larry v. Lawler, 605 F.2d 954, 961 n.8 (7th Cir. 1978) (suggesting that a finding of "good cause" is a prerequisite for granting of confidentiality to sources).

The OIP concurs that agencies should avoid giving blanket assurances of confidentiality without good cause therefore. A contrary policy could easily subvert the policies that underlie part III of the UIPA. Where an agency policy gives a blanket assurance of confidentiality, as does the University Policy in this case, we believe that it should be well founded.

In this case, the University's Policy does promise to those reporting alleged misconduct that their statement will remain confidential, to the extent possible, during the initial or informal stages of the Ethics Committee's inquiry. The University's policy premises this assurance on *unique* power relationships that exist at any university and the possible retaliation that could result from the disclosure of the identities of those reporting misconduct. The OIP believes that the University's assurance of confidentiality, at least during the initial stages of its inquiry, is well founded.[7]

[7]As a point of comparison, in McCutcheon v. U.S Dep't of Health and Human Services, 30 F.3d 183 (D.C. Cir. 1994), the Court found that the U.S. Office of Scientific Integrity ("OSI") properly withheld the names of persons making allegations of scientific misconduct under the federal Freedom of Information Act. The OSI investigates conduct similar to that proscribed by the University's Policy. The court found that complainants have

B. Exemption Ordinarily Protects Only the Identity of the Agency's Source, and Not Information Furnished by the Source

Exemption (k)(5) of the Privacy Act, like section 92F-22(2), Hawaii Revised Statutes, only applies to information that would reveal the identity of a confidential source, and generally does not apply to information furnished by such a source. See Nemetz v. Dep't of Treasury, 446 F. Supp. 102 (N.D. Ill. 1978); Vymetalik v. FBI, 785 F.2d 1090 (D.C. Cir. 1986); see also OMB Guidelines ("if a record can be disclosed in such a way to conceal its source, a promise of confidentiality to the source is not sufficient to grounds for withholding it").

However, there does appear to be one important judicially created exception to this rule. In Volz v. United States Dep't of Justice, 619 F.2d 49 (10th Cir. 1980), the court held that Exemption (k)(5) of the Privacy Act exempts those portions of a document containing information supplied under a promise of confidentiality when the source of the information is known but the specific confidential information itself is not known to the party seeking access. In the Volz case, the FBI gave assurances of confidentiality to a source in the course of a disciplinary investigation of an FBI agent. Upon request of the FBI, after the agent made a Privacy Act request, the agency's source released the agency from the promise of confidentiality as to all the information furnished, except for two paragraphs of information, which the FBI did not disclose. The trial court ordered the release of the two paragraphs that had been withheld and the FBI appealed.

After noting that the purpose of the exemption is to provide the privacy of confidential informants and to facilitate governmental access to investigatory information that would not be made available absent a promise of confidentiality, the court ruled that disclosure cannot be compelled merely because the one seeking disclosure is aware that the source has given information to the agency. The court reasoned:

> These purposes would not be realized if

(..continued)

a strong privacy interest in remaining anonymous because as whistleblowers they might face retaliation were their identities revealed. The court noted that one well qualified immunologist was unable to obtain employment in her field after making allegations of misconduct.

> disclosure could be compelled merely because the one seeking disclosure is aware the source has given information of some sort to the agency. Not only the fact that an individual has talked to an agency but also the information thus obtained is protected from disclosure.
>
> The trial court's ruling fails to recognize the inextricable connection between the source and the substance of a confidential disclosure. [The source] obtained a lawful promise of confidentiality for the fact that he was the source of certain substantive information. That the information contained in the two confidential paragraphs was part of a broader body of information that was released does not alter the result. Subsection (k)(5) protects the confidentiality of any substantive information provided by [the source] insofar as disclosure would reveal that he was the agency's source for that information.

Volz, 619 F.2d at 50 (emphasis added).

The court also found that a contrary conclusion would discourage voluntary disclosures and discourage cooperation by confidential courses and undermine the Privacy Act's attempt to encourage persons otherwise unwilling to reveal information to the government. In a footnote to its decision, the Volz court noted, however, that where information furnished by a confidential source is relied upon by the agency to take disciplinary action, the agency might have to reveal its confidential source or drop the disciplinary action. Volz, 619 F.2d at 50 n.1. As in the Volz case, the University's Policy also recognizes that when the Ethics Committee's inquiry proceeds to a formal investigation the accused has the right to confront and cross-examine witnesses.

Turning to the facts before the OIP in this case, it appears that the University's Policy contains an express promise that statements alleging misconduct will remain confidential, to the extent possible during the initial stages of the Ethics Committee's inquiry. As in the Volz case however, the respondent of the Ethics Committee's inquiry became aware of the identity of the individual filing the statement alleging scientific or scholarly misconduct. The OIP agrees with the court in Volz that

were we to conclude that the statement must be disclosed to the respondent simply because the identity of the source has been made known to the requester, it would subvert the policy underlying section 92F-22(2), Hawaii Revised Statutes. Furthermore, unlike in the Volz case, it does not appear that the agency's source released the University from its assurance and confidentiality; rather, the name of the informant appears to have been leaked, or been disclosed by sources other than the University.

Therefore, for the reasons set forth above, the OIP concludes that the University may withhold the entire statement from the respondent faculty member.

CONCLUSION

We conclude that statement filed with the Ethics Committee reporting instances of alleged misconduct is a "personal record" of the faculty member accused in the statement of misconduct. For the reasons set forth above, we conclude that the statement was submitted to the Ethics Committee under an express promise of confidentiality. The OIP further concludes, based upon the facts of this case and a federal court decision involving analogous facts, that despite the fact that the identity of person filing the statement has been made known to the respondent, section 92F-22(2), Hawaii Revised Statutes, permits the Ethics Committee to withhold the entire statement from the respondent.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

HRJ:sc
Attachment

c: Russell Suzuki
Deputy Attorney General